No. 192

# In the Supreme Court of the United States

OCTOBER TERM, 1952

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

# INDEX

## CITATIONS

Cases:

Cases—Continued

Cases—Continued



Statutes:



Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1952

---

No. 182

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

### OPINION BELOW

The opinion of the Court of Appeals (R. 493-501) is reported at 196 F. 2d 886.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502), and a petition for rehearing was denied on June 7, 1952 (R. 503). A petition for certiorari was filed on July 7, 1952, and was granted on October 13, 1952, as to two of the six

questions presented (R. 508). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and (45a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether it was an abuse of discretion, in the circumstances of this case, for the trial court to limit cross-examination of the Government's key witness, by denying petitioners' motions for the production and inspection of certain pre-trial statements, made by the witness to FBI agents, which were inconsistent with his testimony at the trial.

2. Whether it was an abuse of discretion, in the circumstances of this case, for the trial court to limit cross-examination of this witness by refusing to admit comments of a trial judge in another jurisdiction before whom the witness had previously pleaded guilty for participation in the same crime.

## STATUTES INVOLVED

18 U.S.C. (Supp. V) 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * *; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years,

or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. (Supp. V) 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

## STATEMENT

On December 1, 1950, in the District Court for the Northern District of Illinois, a four-count indictment (R. 3-5) was filed against petitioners and one Albert Swartz, since deceased.[1] Count 1 charged that on July 20, 1950, petitioners unlawfully, wilfully and knowingly had in their possession Kodak Film which had been stolen from a common carrier while moving in interstate commerce from Rochester, New York, to Chicago, Illinois, in violation of 18 U.S.C. 659. Count 3 charged a similar offense on July 27, 1950. Count 2 charged petitioners with causing the property described in

---

[1] On May 28, 1951, the charges against Swartz were dismissed on the Government's motion (R. 15-16).

Count 1, of a value of more than $5,000, to be transported in interstate commerce from Chicago, Illinois, to Detroit, Michigan, in violation of 18 U.S.C. 2314. Count 4 charged a similar offense on July 27, 1950. After a jury trial, petitioners were found guilty and sentenced to ten years' imprisonment (R. 466-468). On appeal, the judgments of conviction were unanimously affirmed (R. 493-501).

At the trial the following evidence was adduced:

On July 8, 1950, a trailer of the Interstate Motor Freight System was loaded at Rochester, New York, with cartons of Eastman Kodak film for shipment to Eastman at Chicago (R. 79-80, 81-84). Heavy waterproof paper was placed around the merchandise for protection, and the trailer doors were sealed shut (R. 22, 81). The bill of lading for the shipment (Gov. Ex. 67, R. 87), and Eastman Kodak packing records (Gov. Ex. 76, R. 150), listed cartons numbered 355 through 360 as included in the shipment.

The trailer arrived in Chicago early in the morning of July 10, 1950, apparently in good condition (Gov. Ex. 70 R. 128; see also R. 93-95). On July 11, when a driver for the Interstate company went to get the trailer for delivery to Eastman, he found the seals broken and torn paper on the ground (R. 105-111). (See also R. 92-104, 113-127.) The FBI was notified (R. 275) and the trailer was then delivered to the Eastman plant in Chicago, where it was unloaded (R. 130).

A comparison of the goods received (Gov. Ex. 75,

R. 150) with the goods shipped as shown by the original bill of lading (Gov. Ex. 67, R. 87), established that the shortage consisted of:

| | |
|---|---|
| 91 cartons | 8 mm Kodachrome Roll |
| 14 cartons | 8 mm Kodachrome magazine |
| 13 cartons | 16 Verichrome Kodak |
| 6 cartons | 16 mm Commercial Kodachrome |

Included in the cartons found to be missing were the cartons numbered 355 through 360, inclusive, containing 16 mm Commercial Kodachrome film.

James I. Marshall who had been arrested in Detroit on July 28, 1950, on a charge of possessing some of the missing film, appeared as a witness for the Government. He testified that on July 20, 1950, he drove from Detroit to Chicago with Albert Swartz, who introduced him to petitioner Gordon at the latter's jewelry store (R. 151-152). Thereafter, the three men drove in Marshall's car to a place where Gordon picked up his car and drove it away (R. 153-154). Marshall and Swartz followed Gordon to a garage, from which, on their arrival, a truck was removed by a fourth man who "resembled [petitioner] MacLeod." Marshall drove his car into the garage and with the help of petitioners proceeded to load cases of Kodak film stacked therein into his car. (R. 155-156.) During the return trip, Swartz gave Marshall a list of the film obtained in Chicago, which Marshall after his arrest turned over to the FBI (R. 158, Govt. Ex. 78). Marshall testified that on this date he and Swartz received 11 cases of 8 millimeter Koda-

chrome, 10 cases of roll Kodachome and 13 cases of 116 film (R. 156, 191, 219). In Detroit, Swartz took one case of the 8 millimeter, one case of the roll Kodachrome, and one of the 116 film (R. 157).

On July 27, 1950, Marshall and Swartz again drove to Chicago where they met petitioner Gordon who instructed them to drive to 215 East Erie Street and ask for Ken (R. 165-167). They proceeded as instructed and met petitioner MacLeod who identified himself as the "Ken" for whom they were looking (R. 167-169). Thereupon, the three men walked to a garage adjacent to the property and petitioner MacLeod again removed the truck. Once again Marshall drove his car into the garage, and, with MacLeod's help, loaded it with cases of film (R. 169). Marshall and Swartz then returned to Detroit (R. 172). Marshall testified that on this date they obtained 20 to 24 cases of 8 millimeter Kodachrome roll film and 5 or 6 cases of 16 millimeter film (R. 169, 170, 213, 218). Swartz took one case of the 16 millimeter film and several cases of the 8 millimeter rolls (R. 173).

Corroboration, in part, of the story told by Marshall was supplied by the testimony at the trial of several FBI agents. Thus, an FBI agent testified that on July 27, 1950, he observed the following: A car pulled into an alley at 215 East Erie Street, and the driver, subsequently identified as Marshall, went into the building, returning in a minute or two with petitioner MacLeod. Marshall then drove his car before the door of a garage at the same address, which was opened by MacLeod, who then drove an old Chevrolet truck marked

"F. White" from the garage into the alley. As Marshall backed his car into the garage, a passenger in Marshall's car, subsequently identified as Albert Swartz, stood by in the alley. After about five or ten minutes, Marshall and Swartz drove off, the back seat of the car full of cartons marked "Kodak." (R. 276-278.) [2]

Other FBI agents testified that on July 27, 1950, they had seen Marshall and Swartz at various points en route from Chicago back to Detroit (R. 306-307, 309, 318).

After Marshall's arrest he turned over to the FBI the film which he still had in his possession (R. 175, 231). Other film was recovered from Swartz and a customer to whom Marshall had sold film (R. 90, 239-240). Included therein was one full carton numbered 356 (Gov. Ex. 1, R. 483) and four empty cartons numbered 355, 357, 358 and 360, respectively (Gov. Ex. 2-5, R. 483-484), of 16 millimeter Kodachrome film.

This case is before the Court because of a series

---

[2] In statements to the FBI, petitioners admitted that they had joint interest in the premises at 215 East Erie Street and the adjacent garage, but denied any knowledge that any stolen film was stored there (R. 260-261, 264-265, 270-273, 285-286). When he took the stand at the trial, petitioner Gordon testified that he refused to purchase film which Swartz wanted to sell him but that he gave Swartz the Erie Street address as a place to store film (R. 338-342). MacLeod testified that Gordon made arrangements for the parking of a truck in the garage, and that some days later a young man whose name he did not know requested him to open the garage. After cases had been unloaded from the truck, MacLeod backed the truck out to enable the man to drive in his car and load the back seat. (R. 357-365.)

of rulings made by the trial judge during the cross-examination of the Government's principal witness, Marshall.

At the close of the first day of cross-examination of Marshall, it was elicited that he had given a signed statement to the FBI shortly after his arrest on July 28, 1950. Counsel for each petitioner, on being apprised that the Government did not have this statement in court, made requests for its production. Both requests were denied. (R. 194-195.)

When cross-examination was resumed the following day, the witness was asked how many statements he had made to the FBI subsequent to his arrest. Objection to this question was sustained. (R. 196.)

The cross-examiner then elicited from Marshall that he had next appeared before the FBI on August 25, which was a week after he had pleaded guilty before a Detroit judge on a charge growing out of his possession of the stolen film (R. 197). Following this, Marshall was asked a number of questions directed at ascertaining whether he had been promised any immunity for his testimony or had any hope of getting consideration in his Detroit case by virtue of his testimony against petitioners in this trial. To all these questions, Marshall replied in the negative. (R. 197-198.) Counsel then sought to introduce an excerpt from the transcript of the Detroit proceeding, because, according to counsel, it was "the basis for part of his motive for testifying" (R. 199). Out of the presence and hear-

ing of the jury, Mr. Callaghan, counsel for petitioner Gordon, read from the transcript, as follows (R. 199):

> The Court: Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence reports. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding.
>
> * * * * *
>
> As I understand it, there was a tremendous amount of film involved,"
>
> * * * * *
>
> and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment.
>
> I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.
>
> The Defendant: Yes, sir. I told Mr. Sherry everything I knew, and I tried to be very cooperative.

Following this reading, Mr. Walsh, counsel for petitioner MacLeod, reiterated that the statement of the Detroit judge should be admitted to show "whether or not this man has a motive that is prejudicial to these persons." Objection to introduction of this statement was sustained, in part, on the ground that numerous questions relating to the witness' motive had already been permitted (R. 200).

Subsequently, the subject of the witness' motive was resumed, as follows (R. 204):

> Q. And you have no hope of immunity or reward for the testimony you are now giving in this court room?
>
> A. No, sir.
>
> Q. Did any person whomsoever suggest to you that if you cooperated with the authorities in this case and testified against others, you would receive consideration?
>
> Mr. Downing: I object, your Honor. This has been gone into before.
>
> The Court: He may answer.
>
> By the Witness:
>
> A. No, sir, my lawyer told me not to testify.

Counsel then returned to the witness' prior statements to the FBI. After the witness admitted that he had not named petitioners in his first statement, counsel again requested its production. The request was denied, but questioning as to the alleged inconsistency was allowed to continue. (R. 205.) In the course of this questioning it was brought out that the witness had first implicated

petitioners five weeks after his first statement, which was one week after he, himself, had pleaded guilty in Detroit (R. 205).

Counsel then continued to question the witness concerning his prior statements to the FBI, and elicited that he had made four or five statements in all, and that each had varied somewhat as the witness recalled some new detail each time he told his story (R. 206). Counsel's request for the production of all these statements was denied (R. 207).

At the close of the trial, the court made the following charge with respect to the care to be used in evaluating the testimony of an accomplice-witness such as Marshall (R. 437):

> Under the instruction which I have given you heretofore, you should scrutinize carefully the testimony of any witness who, as a Government witness, incriminates himself with others in the offense charged. The evidence of such a witness ought to be received with the very greatest care and caution, and subject to the same rules which I have given you governing other witnesses.
>
> The law is that the jury shall consider the testimony of an accomplice and may, if the evidence warrants, find the defendant guilty upon the testimony of any accomplice alone. However, before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall alone, you should find his testimony to be clear and convincing, and to possess the characteristics of

truth, and together with all other evidence in the case, convince you beyond a reasonable doubt.

On appeal, the Court of Appeals for the Seventh Circuit affirmed the petitioners' convictions. As to the questions here presented, that court held that the trial court had not abused his discretion; that the prior inconsistent statements would not have amounted to impeachment of the witness, as his testimony admitted that in those statements he had not implicated the petitioners; that the statement of the Detroit judge did not contain "anything of substantial interest to defendants beyond what had been brought out in Marshall's cross-examination"; "that the failure to admit the transcript could [not] in the slightest degree, have prejudiced the jury which had before it the undisputed facts in this respect"; that it was not "abuse of the discretion" or "prejudicial error" for the trial court to exclude the transcript. (R. 493-501.)

## SUMMARY OF ARGUMENT

### I

The controlling principles for the decision of the present case were given recent and explicit expression in *Michelson v. United States,* 335 U.S. 469. This Court there held, in substance, that the scope of allowable cross-examination was a matter primarily for the discretion of the trial judge.

The considerations underlying that decision do not depend on the particular factual situation or rule of evidence there involved. Matters of the

orderly administration of a trial depending, in turn, on assessment of "numerous and subtle considerations difficult to detect or appraise from a cold record * * *" will ordinarily be left to trial court discretion absent "a clear showing of prejudicial abuse of discretion." *Michelson v. United States, supra,* 335 U.S. at 480. Compare *United States* v. *Socony-Vacuum Co.,* 310 U.S. 150, 231-237; *Glasser* v. *United States,* 315 U.S. 60, 83; *Alford* v. *United States,* 282 U.S. 687, 694.

The efficient and, in the long run, the only proper administration of the federal court system is to rest in the trial courts the utmost of discretion. No amount of rigid appellate supervision and review can or should substitute for effective di trict courts. Particularly in the area of rulings on the admissibility of evidence is it essential that the trial judge be allowed to rule rapidly as the needs of the trial appear to demand. He should not be restrained by the fear that if perchance he slightly errs, the entire proceeding will be reversed. In this case, the two questions presented both involve supposed errors in the rulings of the trial judge which excluded certain evidentiary materials. The fact that either of those questions may appear to an appellate court to have been incorrectly decided does not warrant reversal. As the Court of Appeals below held, this record does not support the charge of abuse of discretion.

## II

Denial of the production and inspection of allegedly inconsistent statements of the government

witness, Marshall, was not, in the circumstances of this case, such a clear abuse of discretion as to warrant reversal by this Court.

A. The fact of contradiction was clearly in the record, and was emphasized on several occasions (R. 205, 207). It was known that Marshall had not implicated petitioners, Gordon and MacLeod, until his fifth statement to the F.B.I. (R. 207), and that this statement followed his plea of guilty (R 197). It was known also that in his first statement Marshall had said that he got the film from Swartz (R. 205).

It was thus apparent that at some point, Marshall was either in error or had lied. The addition of the statements could not have made this clearer.

B. Consideration of the basic purposes for which prior contradictory statements are admitted, to show want of intelligence, memory, or honesty, underlines the conclusion that these purposes are normally satisfied, and in the circumstances of this case, are satisfied, by the showing of the fact of contradiction. See 3 Wigmore, *Evidence* (3d ed. 1940) §§ 1017, 1037.

Although there is dispute in the state courts on this issue, the federal cases clearly support the view that a trial court may, in the exercise of its discretion, exclude prior contradictory statements after proof of the fact of contradiction. See, *e.g. Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *United States* v. *Muraskin*, 99 F. 2d 815 (C.A. 2). Review of the bases of those exercises of discretion demonstrates that the considerations apparent in the

present record bring the questioned rulings well within the normal exercise of discretion.

The decision of the Court of Appeals for the Second Circuit in *United States* v. *Krulewitch*, 145 F. 2d 76, is said to be contrary. But in that case the court had to deal both with a witness who was extremely erratic and also with a prior statement by that witness which expressly and completely exculpated the defendant. The requirement of that case that as full a showing as possible of matters bearing on the credibility of such a witness be permitted may be accepted without concluding that in the present case more than a showing of the contradictions itself was necessary.

C. The fact that the issues arose on a motion to produce does not alter the problem. The trial judge has a "large discretion" with respect to the production of documents. *Goldman* v. *United States*, 316 U.S. 129, 132; cf. *United States* v. *Socony-Vacuum Co.*, 310 U.S. 150.

Although there is some support for the view that it would have been better practice for the trial court to have examined the statements before denying petitioners' motions, the fact that petitioners did not request this, or request that they be made part of the record for purposes of review precludes the assertion of this failure to support their argument that the trial court abused its discretion. See *United States* v. *Rosenfeld*, 57 F. 2d 74, 76 (C.A. 2), certiorari denied, 286 U.S. 556; *United States* v. *Ebeling*, 146 F. 2d 254, 256-257 (C.A. 2).

III

The refusal of the trial court to admit the statement of the Detroit judge to Marshall was not, in the circumstances of this case, such a clear abuse of discretion as to warrant reversal by this Court. There is, in our view, a more serious question of abuse of discretion on this point than in the point discussed in Point II, *supra*. We believe, however, that there is support for the position that even here the trial judge did not abuse the discretion accorded him in matters of cross-examination.

A. The admission of the statement would not have made available to the jury any facts that were not otherwise available to them. It was called to the jury's attention on at least three separate occasions, both on the Government's case in chief and on rebuttal, that Marshall had pleaded guilty in Detroit and that he was unsentenced there. (R. 210, 221, 422.) It was pointed out that over nine months had passed since the time of sentencing, and that not even a date was set for sentencing (R. 210). In these circumstances it was not unreasonable for the trial judge to conclude that this sufficiently showed Marshall's motive to lie.

B. The trial judge, moreover, could reasonably have excluded the Detroit statement to avoid complicating the trial. When the statement was viewed in the light of what both Marshall and the Detroit judge knew, it was clearly not a special inducement for Marshall to lie with respect to the participation of the petitioners. But unless these factors were emphasized, the statement could have

been given a misleading emphasis before the jury. To prevent this might have required the reception of evidence or a detailing of argument which would simply have diverted attention from the main issues.

Whether the trial judge was right or not if he in fact anticipated these complications, it is the kind of immediate forejudgment which it is the special business of trial judges to make. In the circumstances of this case, it was not unreasonable. When this consideration is weighed with the equally reasonable judgment of the trial court that the subject matter of Marshall's bias was sufficienctly shown (see R. 200), his exercise of discretion to exclude the statement seems clearly correct.

C. The cases which have dealt with limitations on the scope of cross-examination draw a sharp distinction between cutting off all examination on a particular subject matter, and merely cutting off the amount or kind of proof. See *Alford* v. *United States*, 282 U.S. 687. Practically all of the cases holding that there has been abuse of discretion have been of the former type. Decisions sustaining exercises of discretion with respect to the latter type clearly encompass the considerations relied upon in the instant case.

D. Both as to the exclusion of the statement of the Detroit judge and as to the refusal of the district court to grant the motion to produce the prior inconsistent statements, discussed in Point II, pp. 13-15, *supra*, the judge's charge to the jury in

large measure satisfied even petitioners' complaints of abuse of discretion in excluding the evidence. This factor of the rectifying power of the judge, as to matters which have occurred at the trial, in his charge to the jury, accentuates the necessity of allowing trial judges great latitude, particularly in matters of cross-examination.

## ARGUMENT

### I

### The Issue in This Case Is Solely Whether the Trial Court Has Abused Its Discretion

The trial court refused to admit the two contested items of evidence in this case apparently because it thought that this evidence would not add significant force to evidence of record in support of the contention that Marshall, the principal government witness, was not credible. Simply as an aspect of its power to control the amount and kind of proof, the trial court decided that this evidence should not be admitted.[3]

The controlling principles for the decision of the issue thus presented were given recent and explicit recognition in *Michelson* v. *United States*, 335 U.S. 469. This Court there held, in substance, that the scope of allowable cross-examination is a matter

[3] The Government's contention with respect to the Detroit judge's statement was that it was immaterial (R. 200). The court's ruling indicates that it thought also that the subject of Marshall's bias had been sufficiently developed (R. 200). The motions for production of the allegedly inconsistent statements were denied without Government objection (R. 205, 207). No attempt was made to exclude either item of evidence by any claim of incompetency or governmental privilege.

primarily for the discretion of the trial judge.

*Michelson* involved a prosecution for bribery of a federal revenue agent. The determination of guilt turned solely on whether the principal government witness or the defendant was believed. 335 U.S. at 471. To support his case, the defendant had produced witnesses who testified to his good reputation. On cross-examination, and over defendant's objection, the trial court permitted the Government to ask these witnesses whether they were aware that the defendant had been arrested for receiving stolen goods some 30 years previously.

This Court held that the admission of this evidence by the trial court was an allowable exercise of discretion. The Court made clear that the considerations governing the admission or exclusion of this evidence were peculiarly appropriate for trial court disposition. It emphasized also that the area of allowable discretion was very wide. It stated (335 U.S. at p. 480) that:

> Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and *therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject.* [Emphasis added.]

It is clear that the principles on which the *Michelson* case relies do not depend on the particular kind of evidence involved in that case. The question whether, in all the circumstances of the *Michelson*

case, it conduced to a fair trial of Michelson's guilt to permit reputation witnesses to be asked about an arrest made 30 years previously is not in principle different from most questions which will arise in controlling the scope of cross-examination, nor from the questions here in issue. In any such instance, the answer will depend, among other things, on the direct or collateral nature of the inquiry, the extent to which the inquiry is repetitious, the extent to which the inquiry involves special risks of prejudice, or the extent to which the inquiry complicates the issues to be understood by the jury. In short, *Michelson* is, on its facts, illustrative of those cases where the significance of a fact offered for proof depends "on numerous and subtle considerations difficult to detect or appraise from a cold record * * *." Consequently, its holding that in such situations, the trial court's discretion will be upheld absent "a clear showing of prejudicial abuse of discretion" must be of general applicability, 335 U.S. at 480.[4] Compare, for similar applications of the same basic principle, *United States* v. *Socony-Vacuum Co.*, 310 U.S. 150, 231-237; *Glasser*

[4] The Court's view in *Michelson* that matters relating to the fair conduct of the trial should be left largely to the trial court is emphasized by another aspect of the case. The Court's opinion shows that it was obviously not satisfied with the good sense or fairness of rules which permitted reputation witnesses to be asked on cross-examination whether they knew of specific crimes with which the defendant had been charged. Evidence of that sort could not have been introduced directly; and it required a limiting instruction that it was to be used only to test the extent of the reputation witness' knowledge.

Both the appellate court and the dissent of Mr. Justice Rutledge vigorously urged alternative rules which they considered fairer, and which would have limited cross-examination of

v. *United States,* 315 U.S. 60, 83; *Alford* v. *United States,* 282 U.S. 687, 694; *United States* v. *Freundlich,* 95 F. 2d 376, 379 (C.A. 2); 3 Wharton, *Criminal Evidence* (11th ed.) § 1308; cf. *United States* v. *Johnson,* 327 U.S. 106.

It is not and cannot be the business of this Court to conduct trials. That must be the business of trial judges. This Court recognized that fact in *Michelson.* A printed record is an inadequate substitute for the on-hand and immediate sense of the needs of the trial. The trial judges must be allowed a wide discretion with respect to issues such as those now before this Court. And discretion, if it is to have any meaning at all, means a discretion to make rulings which, on the record, may appear to the reviewing court to be mistakes. Cf. 1 Wigmore, *Evidence* (3d ed. 1940) pp. 249-250.[5]

---

reputation witnesses either to questions about crimes similar in nature to that for which the defendant was on trial, or, alternatively, to testimony that the defendant's reputation was not good. See 165 F. 2d 732, 735, n. 8 (C.A. 2); 335 U.S. at 496.

But even in the face of its own reservations, the Court declined to adopt any rigid rule of exclusion. See especially, 335 U.S. at 486. It is true that the Court also expressed a reluctance to tinker piece-meal with what seemed to it to be one aspect of a fairly well established rule of evidence. But such reluctance was obviously related to the fact that the established rule permitted trial court flexibility.

[5] "True enough, Supreme Courts are frequently found declaring that the application of a rule was 'in the trial Court's discretion, unless that discretion was abused.' But mostly, we regret to note, this expression is * * * mere palaver. For the Supreme Court then goes on to examine elaborately the trial Court's ruling, and, as likely as not, reverses it. In other words, it is often an 'abuse of discretion' not to agree with the Supreme Court, if the latter on its fresher information takes the opposite view. The Supreme Judicial Courts of Massachusetts and of New Hampshire, on many rules, do faithfully relegate their application to the trial judge. In no other Supreme Court is any such habitual attitude noticeable." 1 Wigmore, *supra,* at 250.

The efficient and, in the long run, the only proper administration of the federal court system is to rest large discretion in trial courts. No amount of rigid appellate supervision and review can or should substitute for effective district courts. Particularly in the area of rulings on the admissibility of evidence, it is essential that the trial judge be allowed to rule rapidly as the needs of the trial appear to demand. He should not be restrained by the fear that if perchance he slightly errs, the entire proceeding will be reversed. In this case, the two questions presented both involve supposed errors in the rulings of the trial judge which excluded certain evidentiary materials. The fact that either of those questions may appear to an appellate court to have been incorrectly decided does not warrant reversal. As the Court of Appeals below held, this record does not support the charge of abuse of discretion.

The words of Mr. Justice Frankfurter, concurring in *Michelson*, neatly emphasize the undesirability of inflexible limitations on the allowable scope of cross-examination (335 U.S. at 487-488):

> To leave the District Courts * * * the discretion given to them by this decision presupposes a high standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.

## II

**Denial of Production and Inspection of Marshall's Allegedly Inconsistent Prior Statements Was Not, in the Circumstances of This Case, Such a Clear Abuse of Discretion as to Warrant Reversal by This Court**

A. *The evidence indicates that the production of Marshall's statements would not have made available to the jury any facts that were not otherwise available to them.*

The first alleged abuse of discretion concerns the trial court's denial of the various motions for the production of statements which had been made by the government witness, Marshall, prior to the statement in which he first implicated petitioners.

Petitioners' first motions directed to the production of the statements were based merely on the theory that a statement had been made which was in the hands of the F.B.I. These motions were denied (R. 194-195). In further development of cross-examination, it was brought out that Marshall had had a number of conferences with the F.B.I., and had made four or five statements between the time of his arrest, on July 28, 1950, and his statement of August 25, 1950, when for the first time, he implicated petitioners, Gordon and MacLeod (R. 205-207).

At least three times during cross-examination, Marshall admitted that in the first four statements he had given to the F.B.I. he had failed to implicate petitioners. The appropriate portions of the record read as follows:

Q. Now, in the first statement you made to Mr. Sheer, you didn't name Kenneth Gordon, did you?

A. No, sir.

Q. And you didn't name Mr. MacLeod in that statement, did you?

A. I don't believe so. [R. 205.]

* * * * *

Q. But you didn't name Gordon, and you didn't name MacLeod? Did you?

A. There wasn't anybody——

Q. Wait a minute, you didn't name Gordon, and you didn't name MacLeod, did you?

A. No, sir.

Q. Now, how long after this first statement you made in July, was it before you ever mentioned the name of Gordon or MacLeod to anybody?

A. August 25th. [R. 205.]

* * * * *

Q. Between July 18 and August 25, you made five statements in writing, and signed each one, is that right?

A. I told you, I believe so.

Q. I didn't hear you?

A. I believe so.

Q. And it wasn't until August 25 that you ever mentioned the name of Gordon and MacLeod?

A. That is correct. [R. 207.]

In addition, Marshall had admitted that in his first statement he said he got the film from Swartz

(R. 205). And facts had been developed to show that his final statement had come only after his own plea of guilty in Detroit (R. 197).

The trial judge did not detail his reasons for preventing petitioners' attempts to show by the F.B.I. statements that Marshall had contradicted himself. But it is clear that the fact of contradiction had been shown in considerable detail; and that consequently the court could reasonably have thought that inspection and presentation of the documents could not sufficiently have advanced the impeaching process to justify the attending delay, inconvenience, and possible confusion to the jury.

B. *The purposes for which prior contradictory statements are admitted can be fully satisfied by the showing of the fact of contradiction; consequently their exclusion will not normally be an abuse of discretion.*

Prior contradictory statements of a witness are relevant to show "a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief." *Commonwealth* v. *Starkweather*, 10 Cush. (Mass. 1852) 60. See 3 Wigmore, *Evidence* (3d ed. 1940) § 1017. Petitioners at no time indicated that their purpose was broader. Such statements are neither relevant nor competent to show that the first statement is true, and certainly could not be used for such a purpose on cross-examination.

*Southern Railway Co.* v. *Gray*, 241 U.S. 333, 337, and cases cited.

Consequently, if the *fact* of contradiction has been shown in such circumstances as to show "a defect of * * * memory" or "a want of moral honesty" and thus, "that the witness is [not] worthy of belief", with respect to the matter at issue, it is difficult to see what substance the statements themselves would add. They *might*, to be sure, give a certain dramatic emphasis to the witness' oral concessions. Cf. 3 Wigmore, *Evidence* (3d ed. 1940) § 1037. But whatever this emphasis is, it can hardly be different in character from what is called merely "cumulative" evidence. Therefore, its admission or exclusion cannot normally, nor in the circumstances of this case, amount to a clearly "prejudicial abuse of discretion." *Michelson* v. *United States*, 335 U.S. at 480.

2. There is a difference of opinion among the states[6] which plainly suggests that the value of

---

[6] See 3 Wigmore, Evidence (3rd ed. 1940, and Supp., 1949), §1037 nn. 4,5, where there is a general survey of the state cases and statutes bearing upon this problem. Dean Wigmore lists the following cases as holding that the mere fact that the witness admits having made the contradictory statement "does not prevent" the opponent from offering it in evidence by his own witnesses: *Lewis* v. *Post*, 1 Ala. 69; *Singleton* v. *State*, 39 Fla. 520 (with doubt); *Hathaway* v. *Crocker*, 7 Mete. (Mass.) 262; *Markel* v. *Moudy*, 13 Nebr. 322, 14 N.W. 409; *Fremont B. & E. Co.* v. *Peters*, 45 Nebr. 356, 63 N.W. 791; *People* v. *Schainuck*, 286 N.Y. 161, 36 N.E. 2d 94.

On the other hand, he states that the following courts have "conceded" that an admission by the witnesses does exclude further proof of contradiction: *Crowley* v. *Page*, 7 C. & P. 789; *Ray* v. *Bell*, 24 Ill. 451; *Atchison, T. & S. F. R. Co.* v. *Feehan*, 149 Ill. 202, 214, 36 N.E. 1036; *Swift* v. *Madden*, 165 Ill. 41, 45 N.E. 979; *Illinois C. R. Co.* v. *Wade*, 206 Ill. 523, 69

prior contradictory statements, after admission of the fact of contradiction, is sharply disputed. Further, the value of any particular contradictory statement will vary, and be sharply disputed, from case to case. In these circumstances, it is clear that the necessity of producing a statement in a particular case in the federal courts—where rules of evidence are not rigidly codified—will depend on those "numerous and subtle considerations difficult to detect or appraise from a cold record" (335 U.S. at 480)—which this Court in *Michelson* held required deference to the discretion of the trial court.

The federal cases support that view. Thus, in *Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800, the trial court's refusal to furnish appellant with a transcript of the pretrial testimony of government witnesses who had testified differently at the trial was upheld because each witness had been cross-examined at length and it had been brought out that they had earlier attempted to deceive the investigators. The court concluded (123 F. 2d at 807):

> Here appellant was accorded the right to and did cross examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial * * *. We have

---

N.E. 565; *Chicago & E. I. R. Co.* v. *Crose*, 214 Ill. 602, 73 N.E. 865; *State* v. *Goodbier*, 48 La. Ann. 770, 19 So. 755; *State* v. *Folden*, 135 La. 591; *State* v. *Cooper*, 83 Mo. 698; *Barnard* v. *State*, 45 Tex. Cr. App. 67, 73 S.W. 957; *Rice* v. *State*, 50 Tex. Cr. 648, 100 S.W. 771; *Schwam* v. *Reece*, 210 S.W. 2d 903 (Ark); *Commonwealth* v. *Runick*, 318 Mass. 45, 60 N.E. 2d 353.

> found no case supporting appellant's contention that there was reversible error in the court's refusal to compel production of the transcripts * * * under such circumstances as are presented here.

The situation in *United States* v. *Muraskin*, 99 F. 2d 815 (C.A. 2), was similar. Appellants had been found guilty on the exclusive testimony of an accomplice who in an earlier proceeding had told a different story. On cross-examination he repudiated his previous version, and appellants asked for a written statement of the original account. The Court of Appeals upheld the trial court's denial of this request, concluding that (99 F. 2d at 816):

> [The requested statement] was competent only in further contradiction of what [the witness] Shecter had just said on the stand; and both his testimony in bankruptcy and his cross-examination as to the substance of the supposititious statement itself had already contradicted that. To these the record could have added nothing of any consequence. * * * He has no privilege to rummage at will through the papers of the prosecution on the chance of turning up something favorable * * *.[7]

See also, *United States* v. *De Normand*, 149 F. 2d 622 (C.A. 2), certiorari denied, 326 U.S. 756; *United States* v. *Walker*, 190 F. 2d 481 (C.A. 2), certiorari denied, 342 U.S. 868; and *United States*

---

[7] To the same effect, *Alto* v. *State*, 215 Wis. 141, 253 N.W. 717; *Chicago & E. I. R. Co.* v. *Crose* 214 Ill. 602, 613, 73 N.E. 865; cf. *State* v. *Folden*, 135 La. 591, 66 So. 223.

v. *Rosenfeld*, 57 F. 2d 74 (C.A. 2), certiorari denied, 286 U.S. 556.

On the other side, petitioners cite two cases which purportedly point the other way. *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2), and *Heard* v. *United States*, 255 Fed. 829 (C.A. 8).[8] Of these only *Krulewitch* can be deemed of significance, in view of the more recent decision of the Court of Appeals for the Eighth Circuit in *Boehm* v. *United States*, *supra*, which indicated that that court had not intended in *Heard* to lay down a fixed rule re-

---

[8] Petitioners also cite *Alford* v. *United States*, 282 U.S. 687, in this connection. That case did not involve a prior contradictory statement. More important, the trial court there cut off cross-examination completely with respect to the fact that the witness was in prison. That ruling cannot be important where the question is *how much* evidence on a particular point is to be permitted.

*Asgill* v. *United States*, 60 F. 2d 776 (C.A. 4), on which petitioners also rely, has some very broad language about the purposes of cross-examination and the nature of matter which should therefore be available to the cross-examining counsel. But in that case, the court was not dealing *merely* with the admission of the prior contradictory statement of a witness who had admitted the fact of contradiction. The witness admitted that the earlier statements were in fact false. But she had, on direct examination, denied that she had written the statements at all, contending that she could neither read nor write, and that she had merely authorized the actual writer to write anything he saw fit in her behalf. Later in the trial, she had admitted her signature to various letters and upon inspection of one of them admitted that she could read it. And, still later, it was shown that she was present when one of the letters was orally dictated.

In these circumstances, it is not surprising that the Court of Appeals should have thought that the letters should have been produced for purposes of "exploratory" cross-examination "to test the witness in matters of recollection, of prejudice or bias, and of truthful statement." 60 F. 2d at 779. There is a difference in kind between using a prior contradictory statement for emphasis, and using it as part of the proof of the fact of contradiction when that is denied.

quiring production of prior statements where the fact of contradiction had otherwise been adequately shown.

*Krulewitch* does hold that the mere fact that prior contradiction has been shown does not in itself necessarily justify refusal to require production of a prior contradictory statement. But, on analysis, *Krulewitch* went no farther than to hold that in the particular circumstances of that case, apparent even from the cold record, the refusal to require production of the prior contradictory statement was error.

In that case the defendant was charged with having transported a woman in interstate commerce for purposes of prostitution. One of the principal prosecution witnesses was a woman who, some 13 months before trial had given a signed statement to the F.B.I., completely and expressly exculpating the defendant. At the trial the woman proved to be a very erratic witness, hysterical, uncooperative and abusive. The defendant's counsel demanded production of the statement; the trial judge examined it and then refused to allow the defendant to examine it. The Court of Appeals, Judge Clark dissenting, held that such denial was reversible error. The court observed that, although the witness on cross-examination had sworn that the statement she had given the F.B.I. was false throughout, "such testimony has never been regarded as an equivalent of the contradictory statement itself." In holding the error prejudicial, the court further stated, "The statement professed to

be a complete account of [the witness'] dealings with the accused, and left him scatheless. [The witness] herself was shown to be to the last degree untrustworthy; and we surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused." 145 F. 2d at 79.

If the *Krulewitch* case is, as we urge, merely a holding that in the circumstances the ruling of the trial judge was an abuse of discretion,[9] it has no significant relevance here, for the circumstances of the instant case are substantially different. It may well be that, when a court is dealing with so completely erratic a witness as the *Krulewitch* witness, the only safe or fair course is to demand that anything material to her credibility be admitted. It may be that when a court is dealing with such a nearly-hysterical witness, it should recognize the possibility that the jury must judge a person whose emotional level is likely to be beyond the normal

[9] But *cf.* the dissent of Judge Clark, 145 F. 2d at 82:

"Here the discretion of the trial judge was carefully and, I believe, wisely exercised. The * * * witness had been subjected to the most lengthy cross-examination by both this accused and his codefendant and had become hysterical and rather offensive in her conduct, although the repetitive questions for the codefendant were an extreme test of patience. At any rate, she freely admitted that she had given a statement to the government agent in conflict with her present testimony, wherein she had exonerated this accused * * *. This witness had been discredited, therefore, as much as was possible; delivery up of the statement would have added no new factor, but would undoubtedly have simply added pages more to the record of bickering of the kind already had *ad nauseam*. The circumstances suggest the necessity of upholding, not constricting, the trial judge's control of such a situation."

range of its community experience. And, therefore, it may be error to cut off cross-examination of such a person at a point where, for more apparently normal persons, such cut-off would be a proper exercise of discretion. In short, it may be that a court has a duty to guide more carefully a jury which must determine the degree of credibility to be attached to a story by an erratically incredible witness. And it may be that this, in substance, is what the *Krulewitch* majority meant when, in justification of its holding, it observed that the witness "herself was shown to be to the last degree untrustworthy" (145 F. 2d at 79).

Moreover, it seems clear that the statements in this case did not, as in *Krulewitch*, directly relate to and exculpate the defendant; the differences were of omission rather than of flat contradiction. Thus, the "subtle considerations" (335 U.S. at 480) in the two cases are of an entirely different character.

If, on the other hand, the majority of the Court of Appeals for the Second Circuit intended to lay down a flat rule that a prior contradictory statement is in all circumstances admissible, then it was attempting to import into federal criminal practice a type of rigidity which is both new and undesirable,[10] and which is contrary to the basic principles to which this Court gave expression in the *Michelson* case.[11]

---

[10] See dissenting opinion of Judge Clark, 145 F. 2d at 81, and cases cited.

[11] Inasmuch as there were other independent grounds for reversal in *Krulewitch*, the decision was not an appropriate one for review in this Court of the particular issue here involved.

C. *The fact that the issues here arose on a motion to produce does not affect the disposition of the case*

The question whether Marshall's statements should have been produced is no different from the question whether their admission as prior contradictory statements was required. For there is no contention that they were admissible in the absence of the contradiction.[12] This Court has explicitly held that a "large discretion must be allowed the trial judge" with respect to the production of documents. *Goldman* v. *United States*, 316 U.S. 129, 132. This is so even where the document has been used at the trial to refresh a witness' recollection. *United States* v. *Socony-Vacuum Co.*, 310 U.S. 150, 231-237. Cf. *Lennon* v. *United States*, 20 F. 2d 490 (C.A. 8); *Little* v. *United States*, 93 F. 2d 401 (C.A. 8). *A fortiori*, documents not used at the trial in any way are not automatically subject to production.[13]

---

[12] Petitioners rely upon a group of cases, principally in the Second Circuit, which have held it error to exclude pertinent documents solely because they were in Government files. *Edwards* v. *United States*, 312 U.S. 473; *United States* v. *Andolschek*, 142 F. 2d 503; *United States* v. *Zwillman*, 108 F. 2d 802; *United States* v. *Grayson*, 166 F. 2d 863; *United States* v. *Beekman*, 155 F. 2d 580. But the doctrine of these cases is not in issue. The exclusion is not sought to be justified on the ground of privilege, but because the fact of the contradiction had been sufficiently shown.

[13] Even with respect to the production of documents required by F. R. Crim. P. 16, the matter is left to the discretion of the trial court. The Rule provides that such papers "may" be ordered produced; and the Reviser's Notes to the Rule explicitly states that "[the] entire matter is left within the discretion of the court."

In addition, it may be noted that the Rule provides for access

There is support for the view that the better practice in disposing of motions to produce is for the court to examine the document itself. See, *e.g.*, *United States* v. *Krulewitch, supra.* Petitioners, however, did not request the trial court to make any independent examination of the Marshall statements. Nor did they request the trial court to make the statements a part of the record on appeal. See *United States* v. *Rosenfeld*, 57 F. 2d 74, 76, certiorari denied, 286 U.S. 556; *United States* v. *Ebeling*, 146 F. 2d 254, 256-257. Compare *United States* v. *Beekman*, 155 F. 2d 580, 584. A trial judge who fails *sua sponte* to examine a document which does not seem to him of significant importance cannot be held to have abused his discretion.

## III

**Refusal to Admit the Statement of the Detroit Judge to Marshall Was Not, in the Circumstances of This Case, Such a Clear Abuse of Discretion as to Warrant Reversal by This Court**

There is, in our view, a more serious question of abuse of discretion on this issue than on the issue discussed in Point II, *supra.* We believe, however, that there is support for the position that even here the trial judge did not abuse the discretion accorded him in matters of cross-examination.

---

only to papers "obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." In the first draft of this Rule, provision was made for the discovery of papers "not privileged." Cf. Clark, J., dissenting, in *United States* v. *Krulewitch*, 145 F. 2d 80, 82. The change reflects a still prevalent reluctance to grant defendants access too broadly, even with discretionary controls, to the Government's case preparations.

A. *The admission of the statement of the Detroit judge would not have made available to petitioners any substantial evidence which was not before the jury.*

Petitioners' second major argument is that the trial court abused its discretion in refusing to permit them to introduce in evidence a statement made by a Detroit judge to Marshall. The statement, see *supra*, p. 9, (a) accepted Marshall's plea of guilty, (b) recited that the case was being referred to the probation authorities, (c) recited the fact that the judge had stated that it seemed to him that if Marshall expected a favorable recommendation from the probation authorities, it would be essential that he satisfy those authorities that he had given full information in this proceeding, (d) observed that, as a tremendous amount of film was involved, it was important for the law enforcement authorities to apprehend all those who participated, and (e) cautioned that "I am not holding out any promises," but "I think that you would be well advised to tell the * * * whole story even though it might involve others" (R. 199).

The purpose of this offer of proof seems to have been to show that Marshall had a motive for testifying that was prejudicial to petitioners, and specifically, that he was hoping for the reward, by virtue of his testimony, of a lighter sentence or probation (R. 199-200).

The trial judge did not state explicitly the basis for his exclusion of this evidence (R. 200). Presumably, he thought it would not have been an in-

ducement to lie. See pp. 37-39, *infra*. Also, he had indicated that he thought he had permitted Marshall to be asked a sufficient number of questions relative to his hope of special treatment (R. 197-198). And in later cross-examination, both on the Government's case-in-chief and on rebuttal, he permitted petitioners' counsel to bring out the fact that Marshall had pleaded guilty, and at the time of the trial was still unsentenced:

> [By Mr. Callaghan]
>
> Q. You are not a defendant in this proceeding?
>
> A. No, sir.
>
> Q. The only proceeding in which you were a defendant was in Detroit, Michigan?
>
> A. That's right, sir.
>
> Q. And it is over 9 months now that your plea in Detroit has been pending, and is undisposed of, and you have not been sentenced in that, have you?
>
> A. No, sir.
>
> Q. And there is not even a date set for your sentence, is there?
>
> A. I don't believe so. [R. 210.]
>
> * * * * *
>
> [By Mr. Walsh]
>
> Q. Mr. Marshall, you have stated now on direct and on cross-examination—I am not sure it was gone into on direct—that you have not been given any promises for your testimony. Is that right?
>
> A. That is right.
>
> Q. Any promise of immunity or reward. Is that true?

A. That is true.

Q. But you have not been sentenced?

A. No, sir.

Mr. Downing: I object.

[By Mr. Walsh]

Q. In connection with this plea of guilty, is that right?

A. No, sir. [R. 221.]

* * * * *

[By Mr. Walsh]

Q. You have plead guilty to a felony?

[Objection by prosecution overruled.]

A. What?

Q. You have pleaded guilty to a felony under the laws of the United States, have you not?

A. Yes, sir.

Q. You are unsentenced for the felony, is that right?

A. That is right. [R. 422.]

The inference that the witness was in a position calling for cooperation with the government is inescapable. Any jury would have made it and would have taken that circumstance into account in weighing his testimony. The excluded statement by the Detroit judge would have disclosed merely that Marshall had been advised to cooperate fully and to tell the whole story of the crime if he expected any leniency in his sentence. It would have added nothing that would not be self-evident as

soon as it was brought to the jury's attention that Marshall was awaiting sentence.

Answer to petitioners' can be made even more particularly. They attach special significance to the fact that the judge made the statement. They apparently feel that knowledge that "inducement" ran from the judge would have impressed the jury. But the point hardly needed this emphasis. It was plainly called to the jury's attention that Marshall's plea of guilty was nine months' old at the time of petitioners' trial. This was an unusual delay and the jury must have known it. They must have known too that it could not have been countenanced without tacit or express consent of the trial court. And, to underline the matter further, petitioners' counsel called their attention to the fact that a date had not even been set for sentencing (R. 210).[14] As we have noted, the purpose of the offer of the Detroit statement was to show that Marshall had a motive to testify that was prejudicial to petitioners. But, of course, petitioners' assertion that the statement had any such effect is not binding on a court. And the court below apparently did not believe the statement was in any way

[14] Moreover, counsel for both petitioners clearly emphasized in their summations to the jury that Marshall had pleaded guilty nine months before trial, but was still unsentenced; and therefore had a motive to please the prosecution. And counsel for petitioner, Gordon, made a detailed argument on Marshall's testimony carefully pointing out the fact that Marshall's early statements did not implicate petitioners; and that the final statement implicating them came only after his August 14 plea of guilty. These summations are not in the printed record, although they were part of the Record on Appeal to the Court of Appeals. They will be filed with the Clerk of this Court.

an inducement to testify falsely. (See R. 200, and see opinion of court of appeals, R. 499.)

Whether the court was right or wrong if the statement is taken alone, there is certainly no substantial basis for arguing that the statement adds significant weight to those considerations which the cross-examination fully brought out.

B. *The trial court could reasonably have thought that admission of the statement of the Detroit judge might have required consideration of matters which would have diverted the attention of the jury without compensating light on the matters at issue.*

The trial judge's decision to exclude the Detroit statement can also be justified as an attempt on his part to prevent further and undue complication of the trial.

The trial judge might well have concluded that the Detroit statement offered no particular incentive to Marshall to lie with respect to the petitioners, not because judges' statements to prisoners in dock never have such effect, but because, in the circumstances of this case, they probably did not have such effect. He might also have thought that on its face the statement would give the jury a misleading impression.

There were only two ways to assure that the statement was not improperly used. One was to admit it, and then permit comment on or a presentation of those facts which showed that the statement was not in this case an inducement to lie about the petitioners. The other was to exclude the statement altogether.

The first alternative might have called for redirect examination as to whether Marshall understood it as an inducement to name people who were not involved. It might have called for redirect as to whether Marshall had any special reason for singling out the petitioners, Gordon and MacLeod, as additional persons to name. It might have called for redirect as to whether Marshall had reason to know whether the F.B.I. knew of the possible involvement of the petitioner, MacLeod (as was the fact, R. 276-278), or of the petitioner, Gordon. It might have called for redirect as to whether the crime was of such magnitude as reasonably to have required a large number of people. It might even have called for redirect as to the function of the probation officer's recommendation.

These and perhaps other issues would have been relevant to Marshall's motives to lie. The trial judge below might well have concluded that in these circumstances, the sensible thing to do was restrict proof to the presentation of the facts which showed all that was reasonably inferable from the judge's statement anyway, and did not as clearly call for diverting answer.[15]

Whether such an analysis of the risk that this would be required would have been right or wrong is not important. It would have been a reasonable forejudgment made in the immediacy of the trial, and could not, as a matter of fact, have caused prejudice to the petitioners.

---

[15] There is of course no inconsistency in saying that the Detroit judge's statement would have added nothing to what had gone before, and yet might have been important enough to require explanation.

*C. Cases dealing with limitations on the scope of cross-examination show (1) that once the basic factors reflecting on a witness' credibility have been brought to the attention of the jury, admission or exclusion of further evidence on the point rests largely within the discretion of the trial court, and (2) that the exercise of discretion with respect to the Detroit statement was well within the commonly applied standards of propriety.*

This Court stated the clearly controlling rule, with respect to cross-examination directed at impeachment, in *Alford* v. *United States*, 282 U.S. 687, 694, as follows:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.

See *United States* v. *Tandaric*, 152 F. 2d 3 (C.A. 7); *United States* v. *Hornstein*, 176 F. 2d 217 (C.A. 7). The rule is simply an application of the doctrine consistently affirmed by this Court that the extent of cross-examination "rests in the sound discretion of the trial court." *E.g.*, *Glasser* v. *United States*, 315 U.S. 60, 83.

In application of this principle, however, it has been properly recognized that there is a difference between cutting off all testimony on a particular showing of bias, and cutting off merely cumulative testimony of such bias. Compare *Alford* v. *United States*, *supra*, with *United States* v. *German-*

*American Vocational League*, 153 F. 2d 860 (C.A. 3), certiorari denied, 329 U.S. 760, and *United States* v. *Stoeflr*, 100 F. Supp. 143, 156 (M.D. Pa.).[16]

The scope of the trial court's discretion in limiting cross-examination is elucidated by the only recent federal criminal cases in which the trial court's discretion, in controlling the extent of cross-examination, has been set aside. Thus, in *District of Columbia* v. *Clawans*, 300 U.S. 617, this Court held it error to refuse to allow *any* questioning of five prosecution witnesses directed at showing mistaken identity and seeking to impeach the credibility of the witnesses. The Court observed (300 U.S. at 632):

---

[16] The cases cited by petitioners concern cutting off all testimony on a particular showing of bias, and therefore do not control the present case.

*Alford* v. *United States*, 282 U.S. 687, held that it was improper to cut off *in limine* all questioning concerning the witness' residence, business, etc., which was to have shown that he was in the custody of federal officials and therefore might have a motive to testify as the government wished him to. Cross-examination was not merely limited. On an important and proper subject it was entirely foreclosed. *Sandroff* v. *United States*, 158 F. 2d 623 (C.A. 6), and *Farkas* v. *United States*, 2 F. 2d 644 (C.A. 6), involved similar situations. In *Sandroff*, the trial judge had cut off all cross-examination directed at learning why the witness had been named a co-defendant but not indicted and whether he had been promised immunity. In *Farkas*, it was held error to exclude all testimony that an accomplice-witness had pleaded guilty, but as of the time of trial had not been sentenced. Abuse of discretion was found in *Meeks* v. *United States*, 163 F. 2d 598 (C.A. 9), because the trial court not only excluded evidence showing that the chief government witness was on parole at the time he testified but also refused, on the court's own motion, to allow the witness to answer questions on cross-examination relating to his previous sentence and current parole status.

> [T]he prevention, throughout the trial of a criminal case, of *all* inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion * * *. [Italics supplied.]

In *Arnold* v. *United States,* 94 F. 2d 499 (C.A. 10), cross-examination of two accomplice-witnesses who had admitted prior convictions was cut off when counsel sought to ascertain the nature of their felonies. This was held to be error since, in the circumstances of this case, it was vitally important in impeaching their credibility to show conviction of a crime involving moral depravity, so that there cross-examination was terminated before it could reach the truly relevant impeaching factor. In *Lindsey* v. *United States,* 133 F. 2d 368 (C.A. D.C.), the trial court had thwarted the defense's repeated efforts to show on cross-examination that government mental experts' testimony concerning defendant's sanity at the time of the trial was inaccurate and misleading. Since insanity was the sole defense relied upon, the Court of Appeals held it reversible error to prevent all cross-examination going to the refutation of the prosecution's mental testimony. In *Dickson* v. *United States,* 182 F. 2d 131 (C.A. 10), where false representation as a United States officer was an element of the offense to be proved, it was held error to prohibit any cross-examination of the principal

government witness as to the conversation during which the alleged false representations were made. In *J. E. Hanger, Inc.* v. *United States*, 160 F. 2d 8 (C.A. D.C.), no cross-examination whatsoever had been permitted. The inference is strong that the range of reviewability in this area is narrow. Only where the cross-examiner has been prevented from bringing out matter relevant to the central issue of the case, or not allowed even to bring out essential impeaching factors, have there been findings of abuse of discretion.[17]

On the other hand, a considerable number of cases have affirmed the trial court's discretion to limit cross-examination once fairly begun in a variety of circumstances: *Shama* v. *United States*, 94 F. 2d 1 (C.A. 8), certiorari denied, 304 U.S. 568 (cross-examination of a government witness with regard to her illicit relations with various men cut off because other testimony showed her immorality); *Hider* v. *Gelbach*, 135 F. 2d 693 (C.A. 4) (cross-examination cut off after ten questions on a particular point); *Girson* v. *United States*, 88 F. 2d 358 (C.A. 9), certiorari denied, 301 U.S. 697 (cross-examination cut off because in the view of the trial judge the subject was substantially

[17] Petitioners' reliance on the *Alford* line of cases suggests that they think that in some way cross-examination was cut off *in limine* (see Br. 21-28). But the fact that a particular inquiry is not permitted is not enough to invoke *Alford*. A subject matter of inquiry must be cut off. If the consequence of the refusal to admit the Detroit statement were that there was no showing of bias, then we would have an *Alford* situation. But the facts out of which bias arose were clear, and this subject matter was not cut off. Only the amount and kind of evidence on a subject matter fully exposed was limited.

exhausted); *United States* v. *Hunt*, 120 F. 2d 592 (C.A. 7), certiorari denied, 314 U. S. 625 (cross-examination was limited to matters already before the jury in other evidence); *United States* v. *Ginsburg*, 96 F. 2d 882 (C.A. 7), certiorari denied, 305 U.S. 620 (cross-examination of a witness who had admitted taking dope cut off when witness was asked where he got it, because the inquiry was thought to be "collateral"); *Touhy* v. *United States*, 88 F. 2d 930 (C.A. 8), certiorari denied, 316 U.S. 702 (court stopped defense from asking a witness what his purpose was in testifying for the government, because he had already been asked what promises of immunity and other benefit he had received); *Gates* v. *United States*, 122 F. 2d 571 (C.A. 10), certiorari denied, 314 U.S. 698 (court refused to let defendants introduce letters showing a government witness intended to enter into business competition with them and so might have a motive to lie, because evidence had already been admitted on the point); *Goldstein* v. *United States*, 63 F. 2d 609 (C.A. 8) (court prevented questioning on cross-examination directed at showing prices received for furs sold at auction, the purpose of such questioning being to show that defendant, who was being tried for using the mails to defraud, had not been paying too low a price to the trappers whom he allegedly was defrauding, because it was not sufficiently clear that the *dates* on which those prices were shown were close enough to be controlling). See also: *Holmes* v. *United States*, 134 F. 2d 125, 134-135 (C.A. 8), certiorari denied, 319 U.S. 776; *Rose* v. *United States*, 128 F.

2d 622, 625-626 (C.A. 10); *Madden* v. *United States*, 20 F. 2d 289 (C.A. 9).

It is true that exercises of discretion with respect to basically factual problems necessarily make decision from case to case very largely *ad hoc*. But out of repeated applications of judgment to similar demands of a "fair trial", standards, however incapable of explicit expression, can nevertheless be drawn.

We think that the bases on which this record supports the exclusion of the Detroit statement on cross-examination are at least as adequate as those which can be invoked to explain the exclusions in the cases just noted. As the court of appeals here said (R. 500), "We cannot believe that the failure to admit the [Detroit] transcript could, in the slightest degree, have prejudiced the jury, which had before it the undisputed facts in this respect. * * * [T]his record reflects a most thorough cross-examination as to all Marshall's actions and motives. * * * The offered evidence threw no further light upon or impeached in any way what he had already said. * * * [I]t was not prejudicial error for the court to exclude the transcript; it was not abuse of the discretion, concerning the scope and limitation of cross-examination, with which the trial court is endowed."

In almost all of the cases above noted it could have been urged that the particular examination cut off deprived the party of emphasis that would have impressed the jury.[18] As it is impossible to

[18] *Shama* v. *United States*, 94 F. 2d 1 (C.A. 8), is an example. That was a prosecution for violation of the White Slave Act

ascertain just what quanta of evidence or what points, can win or lose a jury, there is in every such ruling a risk of prejudice. But in those cases, and in the present, the exclusion did not, we submit, amount to a "clear showing of prejudicial abuse of discretion". *Michelson* v. *United States*, 335 U.S. at 480.

D. *Any abuse of discretion was substantially ameliorated by the charge to the jury, which called attention to the need to scrutinize carefully Marshall's testimony*

Both as to the exclusion of the statement of the Detroit judge and as to the refusal of the district court to grant the motion to produce the prior inconsistent statements, discussed in Point II, pp. 23-34, *supra*, the judge's charge to the jury substantially satisfied even petitioners' complaints of abuse of discretion in excluding the evidence.

On the basis of the record before this Court, granting either or both of the disputed requests would not have altered the outcome of the trial. The

---

of 1910. The contested issue was whether the defendant intended to use the woman involved for purposes of prostitution at the time he caused her to cross into the state. Cross-examination of this woman with regard to her illicit relations with one Coots, offered to reflect on her credibility, was cut off because other testimony showed her immorality. As Coots was the person who first brought the woman to defendant's attention, and as he figured importantly in the case, testimony of his relationship with the woman may well, as a practical matter, have been more damaging to her credibility on the crucial issue than other testimony as to her immorality. But without respect to the merits of this issue, the court of appeals thought that the matter was plainly within the discretion of the trial judge. 94 F. 2d at 5.

objective of petitioners in making both requests was to show that the chief government witness was untrustworthy. However, the jury was made fully aware on cross-examination that the witness had failed to implicate petitioners in his earlier accounts of the crime, that he was an accomplice and had plead guilty to a charge of possessing some of the stolen film, and that as of the time of his testifying he was as yet unsentenced. This knowledge without more was sufficient to put the jury on guard. In fact, however, there was more, namely, a careful instruction as to the caution to be used in evaluating the testimony of an accomplice-witness. The relevant portions of the instruction follow (R. 437):

> Under the instruction which I have given you heretofore, you should scrutinize carefully the testimony of any witness who, as a Government witness, incriminates himself with others in the offense charged. *The evidence of such a witness ought to be received with the very greatest care and caution*, and subject to the same rules which I have given you governing other witnesses. [Italics supplied.]
>
> The law is that the jury shall consider the testimony of an accomplice and may, if the evidence warrants, find the defendant guilty upon the testimony of any accomplice alone. However, before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall alone, you should find his testimony to be clear and convincing, and to possess the characteristics of truth, and

together with all other evidence in the case, convince you beyond a reasonable doubt.

Indeed, this power of the trial judge, by means of his charge to the jury, to adjust and rectify matters which have occurred at the trial, accentuates the necessity of allowing trial judges great latitude, particularly in matters of cross-examination.

## CONCLUSION

The right to exercise discretion means the right to make what may later seem to be mistakes. Whether or not any mistakes were made with respect to either of the challenged rulings, this record does not present, as *Michelson* requires, a "clear showing of prejudicial abuse of discretion." It is therefore respectfully submitted that the judgment below should be affirmed.

WALTER J. CUMMINGS, JR.,
*Solicitor General.*
CHARLES B. MURRAY,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
JOHN R. WILKINS,
HOWARD ADLER, JR.
*Attorneys.*

DECEMBER, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 233379 700